1987

Bosch v. Busch Development : Brief of Respondent

Utah Supreme Court

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870429

IN THE SUPREME COURT OF THE STATE OF UTAH

TIMOTHY R. BOSCH, Plaintiff-Appellant, vs. BUSCH DEVELOPMENT, INC., Defendant-Respondent.	:	Case No. 870429 Consolidated for Appeal With
RITA L. PATE, Plaintiff-Appellant, vs. MARATHON STEEL COMPANY, an Arizona corporation, HENSEL-PHELPS COMPANY, a Colorado corporation, and ERICO PRODUCTS, INC., an Ohio corporation, Defendants-Respondents.	:	Case No. 20485 Category 14b

REPLY BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Defendant/respondent Busch Development, Inc. (Busch), by and through its undersigned counsel, submits the following brief.

JURISDICTION

Jurisdiction in this Court is proper pursuant to Article VIII, Section 3 of the Constitution of Utah, §78-2-2, Utah Code Ann. (1953 as amended), and Rule 3 of the Rules of the Utah Supreme Court.

NATURE OF THE PROCEEDINGS BELOW

The proceedings below consisted of Busch's motion for summary judgment and the motion of plaintiff/appellant Timothy R. Bosch (plaintiff) for partial summary judgment. The lower court granted Busch's motion and denied plaintiff's motion.

STATEMENT OF ISSUES

1. Was the trial court correct in ruling that since Busch was plaintiff's "employer" as that term is defined in Utah Code Ann., §35-1-42, Busch was entitled to the benefit of the exclusive remedy provision of Utah Code Ann. §35-1-60 and, therefore, not subject to suit by plaintiff?

2. Does Utah Code Ann. §35-1-62 enable plaintiff to maintain his action against Busch despite the exclusive remedy provision of Utah Code Ann. §35-1-60?

3. Was the trial court correct in ruling that the penalty provision of Utah Code Ann. §35-1-57 is not applicable

to Busch and does not enable plaintiff to sue Busch in circumvention of the exclusive remedy provision of Utah Code Ann. §35-1-60?

DETERMINATIVE STATUTES

1. 1917, Utah Laws, Ch. 100, §50.
2. 1917, Utah Laws, Ch. 100, §52a.
3. 1917, Utah Laws, Ch. 100, §53.
4. 1917, Utah Laws, Ch. 100, §71.
5. 1917, Utah Laws, Ch. 100, §72.
6. 1919, Utah Laws, Ch. 63, §3110.
7. Utah Code Ann., §35-1-19 (1953 as amended).
8. Utah Code Ann., §35-1-39 (1953 as amended).
9. Utah Code Ann., §35-1-42 (1953 as amended).
10. Utah Code Ann., §35-1-46 (1953 as amended).
11. Utah Code Ann., §35-1-57 (1953 as amended).
12. Utah Code Ann., §35-1-58 (1953 as amended).
13. Utah Code Ann., §35-1-60 (1953 as amended).
14. Utah Code Ann., §35-1-62 (1953 as amended) (pre-1975 amendment).
15. Utah Code Ann., §35-1-62 (1953 as amended) (post-1975 amendment).

The text of the foregoing statutes is reproduced in full in Appendix A. With respect to numbers 7, 8 and 10-13 above, the statutes reproduced in Appendix A reflect the provisions in effect in 1981 when the accident occurred which gave rise to this action.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a negligence action against the general contractor of a construction project by an employee of the general contractor's independent subcontractor for injuries the employee received in an on-the-job accident.

B. COURSE OF PROCEEDINGS

Defendant Busch filed a motion for summary judgment based on the exclusive remedy provision of Utah Code Ann. §35-1-60. While that motion was under advisement in the trial court, plaintiff filed a motion for partial summary judgment based on the penalty provision of Utah Code Ann. §35-1-57.

C. DISPOSITION IN LOWER COURT

Defendant Busch's motion for summary judgment was granted and plaintiff's motion for partial summary judgment was denied.

STATEMENT OF FACTS

1. On December 1, 1984, Busch was engaged as owner, developer, and general contractor in the construction of Busch Park, Phase III, a commercial office complex located in Salt Lake County, Utah. (R., p. 2, ¶4 and pp. 30-31).

2. Busch had subcontracted with Thermal Energy Amalgamated Manufacturing Corporation (TEAM) for the manufacture and

installation of aggregate rock "crystal panels" on a building involved in Phase III. (R., p. 34, ¶2 and p. 45).

3. In the contract between Busch and TEAM, TEAM agreed to purchase and maintain workmen's compensation insurance and also represented and agreed that it was the holder of a specific workmen's compensation insurance policy. (R., p. 148 ¶4).

4. Plaintiff, Timothy R. Bosch was one of several individuals employed by TEAM to install the crystal panels. (R., p. 2, ¶3).

5. On December 1, 1981 while engaged in his employment with regard to the Busch Park Phase III project, plaintiff fell from a beam in the building on the construction site and received personal injuries. (R., p. 2, ¶3; p. 3, ¶6 and p. 148, ¶5).

6. Plaintiff has received workmen's compensation benefits with regard to the injuries he received in the December 1, 1981 incident. (R., p. 148, ¶6).

SUMMARY OF ARGUMENTS

1. Utah Code Ann. §35-1-60 provides that the right to recover compensation under the Workmen's Compensation Act shall be the exclusive remedy against the "employer". "Employer" is defined in Utah Code Ann. §35-1-42. Plaintiff has conceded on appeal that Busch is his "employer" as defined in §35-1-42. Plaintiff's exclusive remedy against Busch, therefore, is the workmen's compensation benefits he has received.

2. Utah Code Ann. §35-1-62, preserves an injured employee's right to maintain a tort action against third parties "other than the employer". The 1975 amendment to that provision does not abrogate the civil immunity accorded "employers", including Busch, under the exclusive remedy provision of Utah Code Ann. §35-1-60.

3. Busch, as plaintiff's "statutory employer", is entitled to the benefit of the exclusive remedy provision of Utah Code Ann. §35-1-60, regardless of who actually paid benefits. It is contrary to the plain language of the Workmen's Compensation Act to strip from Busch the benefit of the exclusive remedy provision simply because plaintiff received workmen's compensation benefits from the subcontractor's insurance company and not from Busch. Denying Busch the benefit of the exclusive remedy provision under those circumstances also defeats the purpose for which the "statutory employer" provision was enacted.

4. Busch has complied with the requirements imposed by the Workmen's Compensation Act, and plaintiff has received workmen's compensation benefits. The penalty provision of Utah Code Ann. §35-1-57 has no application to this case and does not entitle plaintiff to maintain his action.

ARGUMENT

INTRODUCTION

In the trial court, Busch filed a motion for summary judgment, arguing that it was plaintiff's "employer" as defined

in §42[1] and that, accordingly, under §60, plaintiff's exclusive remedy against Busch is the workmen's compensation benefits plaintiff has already received. Plaintiff argued that Busch was not plaintiff's "employer"[2] and that, in any event, even if Busch were plaintiff's employer, the exclusive remedy provision of §60 did not preclude plaintiff's suit against Busch. The trial court ruled that Busch is plaintiff's "employer" as defined in §42 and that, pursuant to §60, plaintiff's exclusive remedy against Busch is the workmen's compensation benefits he has received. As discussed more fully in Points I through III below, the trial court's granting Busch's motion for summary judgment was proper and should be affirmed.

Additionally, plaintiff filed a motion in the trial court for partial summary judgment, arguing that even if Busch is plaintiff's "employer" under §42 and entitled to immunity under §60, plaintiff may nevertheless maintain his action against Busch pursuant to the penalty provision in §57. The lower court denied plaintiff's motion. As more fully discussed in Point IV below, the trial court's denial of plaintiff's mo-

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1 All references to section numbers refer to that section as found in Title 35, Chapter 1, Utah Code Ann., as in effect in December 1981, unless indicated otherwise.

2 Apparently to avoid any inconsistency with the argument under Point II of his brief regarding the penalty provision of §57, plaintiff has conceded on appeal that Busch is plaintiff's "employer" as defined in §42.

tion for partial summary judgment was proper and should be affirmed.

POINT I.

AS PLAINTIFF'S "STATUTORY EMPLOYER", BUSCH IS ENTITLED TO THE BENEFIT OF THE EXCLUSIVE REMEDY PROVISION OF §60

Section 60 of the Workmen's Compensation Act (Utah Code Ann. §35-1-1, et seq.) (the Act) states in part as follows:

> The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer...and no action at law may be maintained against an employer...based upon any accident, injury or death of an employee.

The term "employer" is not defined in §60. It is defined in §42. That section defines "employer", in part, as one who "procures any work to be done wholly or in part for him by a [sub]-contractor...." This is the so-called "statutory employer" provision.

On appeal, plaintiff has conceded that Busch is his "employer" as defined in §42. Furthermore, it is undisputed that Busch has received workmen's compensation benefits.

Section 60 clearly states that the right to recover workmen's compensation benefits shall be the exclusive remedy against the "employer". Section 60 does not define "employer" and does not differentiate between the actual employer and the

so-called "statutory employer". The plain language of §60 indicates that plaintiff's exclusive remedy against Busch, plaintiff's "statutory employer", is the workmen's compensation benefits plaintiff has already received. Accordingly, the lower court's granting Busch's motion for summary judgment was correct and should be affirmed.

POINT II.

SECTION 62 DOES NOT ELIMINATE BUSCH'S RIGHT TO THE BENEFIT OF THE EXCLUSIVE REMEDY PROVISION OF §60

Despite the foregoing, plaintiff argues that §62, relating to actions against third parties, entitles him to maintain a tort action against Busch. The fallacy of plaintiff's argument will be demonstrated below first by examining the background and history of the workmen's compensation statutory scheme, and specifically the "statutory employer" provision in §42 and, second, by a close examination of §62 and the 1975 amendment.

A. BACKGROUND AND HISTORY

Prior to the enactment in 1917 of Utah's Workmen's Compensation Act, an employee injured on the job was in the same position as any other victim of a tort. That is, in order to recover for injuries sustained in an on-the-job accident, the employee was required to pursue a tort action and prove negligence against the tortfeasor.

If the employee's injuries were caused by the negligence of the employer, the employer might ultimately be found liable and be required to compensate the employee for his or her injuries. In the meantime, however, the injured employee would be faced with the uncertainty, cost, delay, and other negative effects associated with a tort action. The injuries might prevent the employee from returning to work, leaving the employee without means of support and ability to pay hospital and doctor bills. Moreover, the employee's recovery of compensation might be barred completely because of some defense such as contributory negligence. The injured employee and the employee's family could become a burden on society as welfare becomes the only resort.

In 1917, the Utah Legislature attempted to remedy the situation described above by enacting the Workmen's Compensation Act. The Act established "a no-fault system...to guarantee an employee some financial compensation for injuries incurred by him in the scope of his employment..." Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561, 564 (Utah 1978) (Wilkins, J. dissenting). The Act enabled such an injured employee to recover the compensation enumerated in the Act without regard to fault and without having to prove negligence. The primary purpose of the Act was

> to eliminate the uncertainty, the time, effort and expense involved in the old system

> which required an injured employee to prove negligence of his employer as a pre-requisite to any recovery, and to create a system whereby the injured employee would be assured of medical and hospital care, and a certain though modest compensation for injuries and disabilities suffered, with the attendant benefits to themselves, their families, and to society generally, including the stabilizing effect upon the economy.

Smith v. Alfred Brown Co., 493 P.2d 994, 995 (Utah 1972).

Under the Act, the burden fell on the employer to "secure compensation" so that an injured employee would be paid the benefits provided for in the Act. The idea was to shift the burden of an employee's injury away from the employee, who was least able to bear it, to the employer, who was better able to bear it. The Act did not require the employer actually to pay workmen's compensation benefits to an injured employee. 1917 Utah Laws, Ch. 100, §52a. The Act merely imposed upon an employer the obligation to "secure compensation" and ensure that workmen's compensation insurance coverage was in place to pay benefits in the event an employee were injured. 1917 Utah Laws, Ch. 100, §53. The cost of fulfilling this obligation to secure workmen's compensation insurance coverage for the benefit of

employees who might be injured on the job became simply an additional cost of doing business for the employer.[3]

Had the Workmen's Compensation Act merely conferred a benefit on the employee and imposed a burden on the employer, it would have been nothing more than a legislated welfare system with the injured employee as the recipient and the employer as the provider. However, the statutory scheme created by the Workmen's Compensation Act contemplated a counterbalancing arrangement whereby the employee receiving the benefit would also relinquish something, and the employer upon whom the burden is placed would receive something in return. The "quid pro quo" of the Act which provided this counterbalancing effect was the

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3 For most employers, the requirement of the Act to "secure compensation" meant that the employer had to purchase a workmen's compensation insurance policy from either a private insurance company or the State Insurance Fund. The additional cost of doing business for such employers was, therefore, the cost of the premium to obtain the workmen's compensation policy.

The Act also allowed an employer to "secure compensation" by qualifying as a self-insurer. In such cases, the employer itself, rather than an insurance company, actually paid benefits to an injured employee. However, even where the employer as self-insurer actually paid benefits, the burden imposed by the Act was simply an additional cost of doing business. The self-insured employer would merely retain the amount it would have paid in premiums to an outside insurance company for workmen's compensation insurance coverage and provide that coverage itself. In effect, the employer became its own insurance company. Presumably, for such an employer with a large number of employees, the additional cost of doing business incurred as a result of actually paying benefits would be no greater than, and perhaps less than, the cost of premiums to an outside insurance company.

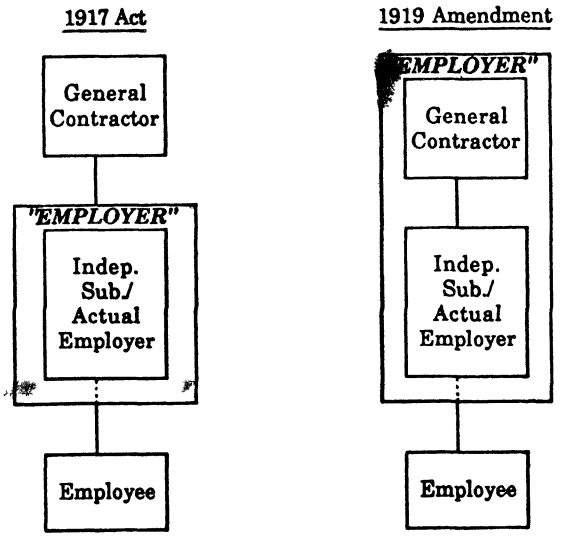
exclusive remedy provision found in the predecessor to §60. 1917, Utah Laws, Ch. 100, §71.

The exclusive remedy provision in the 1917 Act stated that, except in certain circumstances, "the right to recover compensation pursuant to the provisions of this Act for injuries sustained by an employee shall be the exclusive remedy against the employer...". Hence, in exchange for receiving certain and almost immediate compensation benefits in the event of an injury, the employee gives up the right to sue his employer. On the other hand, in exchange for incurring the additional cost of doing business created by the requirement to "secure compensation" for its employees, the employer is given the benefit of immunity from tort actions by injured employees. Thus, the employee is protected from the uncertainty, cost, delay, and other negative effects of a tort action and is given certain and almost immediate compensation, while the employer is protected from the "hazards of exorbitant and in some instances, ruinous liabilities." Adamson v. Okland Construction Co., 508 P.2d 805, 807 (Utah 1973).

When the Workmen's Compensation Act was originally enacted in 1917, the definition of "employer" in the predecessor to §42, so far as relevant, spoke in terms of only actual common-law employers. 1917 Utah Laws, Ch. 100, §50. See generally, Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561, 564 (Wilkins, J. dissenting) ("This Court, though, used the touchstone

of common-law principles defining the master-servant relationship in aid of [the Act's] definition [of employer].") Actual employers constituted the class of employers subject to the provisions of the Act.

With the addition in 1919 of the statutory employer provision in the predecessor to §42, the definition of "employer" expanded to include not only actual common-law employers, but also "statutory employers"; that is, those such as general contractors who at common law were not employers, but who procured work to be done for them by independent subcontractors. 1919 Utah Laws, Ch. 63, §3110. The effect of the 1919 amendment adopting the "statutory employer" provision and expanding the category of "employers" subject to the Act is illustrated below. The areas highlighted in blue represent the category of "employers" as defined in the Act.



With this expansion of the category of employers subject to the Act came also an expansion of the category of employers entitled to the benefit of the exclusive remedy provision. Prior to 1919, the exclusive remedy provision (the predecessor to §60) stated that the right to recover compensation pursuant to the provisions of the Act shall be the exclusive remedy against the "employer". Before 1919, the term "employer" was defined in the predecessor to §42 in terms of actual common-law employers. Therefore, the exclusive remedy provision extended only to actual common-law employers.

After the 1919 amendment, the predecessor to §60 still provided that the right to recover compensation pursuant to the provisions of the Act shall be the exclusive remedy against the "employer". However, the term "employer" was now defined as not only actual common-law employers, but also "statutory employers". Therefore, the benefit of the exclusive remedy provision extended to both actual common-law employers and "statutory employers". Since 1919, there has been no substantive change in the relevant language of either §42, defining "employer", or §60, indicating those entitled to the benefits of the exclusive remedy provision.

It is critical to note that in adopting the "statutory employer" provision and in expanding the category of those upon whom was imposed the burden of securing compensation for injured employees, the Legislature did not create some special framework

to apply only to "statutory employers". The Legislature did not specifically indicate that "statutory employers" should be given any greater burden or accorded any less favorable treatment than actual employers. The Legislature merely expanded the definition of "employer", which was already in place, and allowed the other provisions of the Act where the term "employer" was used, including the exclusive remedy provision in the predecessor to §60, to remain unchanged.

Such indicates an intention on the part of the Legislature to extend the same immunity to "statutory employers" as was enjoyed by actual employers. The Legislature did not intend merely to impose a burden without also giving the "quid pro quo" which is the hallmark of the workmen's compensation statutory scheme. Had the Legislature not extended the same immunity to statutory employers, it would have been creating a type of legislated welfare system with the employee as recipient and the "statutory employer" as provider. The language of the Act indicates that such was not the intention of the Legislature.

Giving immunity to "statutory employers" is consistent with the original purpose of the "statutory employer" provision. As indicated above, the original definition of "employer" spoke in terms of only actual common-law employers. One in the position of a general contractor who hired independent subcontractors was not, therefore, an "employer" subject to the Act. This situation allowed unscrupulous employers to avoid the require-

ment to secure compensation for their employees. Rather than hire employees in a typical common-law relationship, such an employer could instead engage an irresponsible or even sham independent subcontractor who would then hire employees to do the work. Because technically it was not the "employer" of the subcontractor's employees, the general was not required to secure compensation for those employees. When an injured employee sought workmen's compensation benefits, the employee would discover that the subcontractor had not secured any insurance coverage and that the subcontractor was judgment-proof. The employee could not seek workmen's compensation benefits from the general contractor because it was not technically an "employer". See generally Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561, 564-565 (Utah 1978) (Wilkins, J. dissenting).

The "statutory employer" provision is designed to prevent the kind of situation described above from occurring. The purpose of the provision is

> to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers.

Pinter Construction Co. v. Frisby, 678 P.2d 305, 307 (Utah 1984). Stated otherwise, the object of the "statutory employer" provision is "to give the general contractor an incentive to require subcontractors to carry insurance." 2 Larsen, Workmen's Compensation Law §72.31(b) at 14-49 (1986).

The provision makes the general contractor an "employer" and imposes upon it the same duty to "secure compensation" as is imposed upon the actual employer, making the general contractor ultimately liable if there was no workmen's compensation insurance coverage. The burden on the general contractor to "secure compensation" and the ultimate liability if such compensation is not secured provides the incentive for the general contractor to hire responsible subcontractors and to insist that they maintain workmen's compensation insurance coverage.

If not given immunity, the "statutory employer" would have little if any incentive to ensure that only responsible subcontractors are hired and to insist that the subcontractor carry appropriate compensation protection for their workers. Without immunity, the general contractor has the same ultimate exposure to liability whether or not the subcontractor maintains insurance. On the one hand, if the subcontractor has insurance, the general contractor is subject both to liability for workmen's compensation benefits[4] and also to tort liability. On the

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4 The general contractor is ultimately subject to liability for workmen's compensation benefits because §62 provides that the employer or insurance carrier who pays benefits to the injured employee becomes "trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employe...." Hence, if an injured employee recovers workmen's compensation benefits from the actual employer's insurance company, that insurance company may maintain an action against the general contractor to recover the amount of the benefits paid.

other hand, if the subcontractor does not have insurance, the general contractor is in the same position: it is subject both to liability for workmen's compensation benefits as an "employer" and also to tort liability. The general contractor is in no better position by hiring a responsible subcontractor and insisting that it maintain appropriate insurance coverage. Removing the general contractor's immunity, therefore, ultimately defeats the purpose for which the "statutory employer" provision was adopted.

In summary, the language of the Act and of the "statutory employer" provision indicates that the Legislature intended merely to plug the "statutory employer" into the statutory framework created by the Act. That framework comprehends a counterbalancing arrangement whereby the "quid pro quo" of the exclusive remedy provision is given to the "employer", including "statutory employer", in exchange for the burden imposed by the Act. Furthermore, the purpose for which the "statutory employer" provision was adopted would be defeated by not extending to the "statutory employer" the benefit of the exclusive remedy provision of §60. Busch, as plaintiff's "statutory employer" is, therefore, entitled to the benefit of §60's exclusive remedy provision.

B. Section 62 AND THE 1975 AMENDMENT

As indicated above, in 1917 the Utah Legislature enacted the Workmen's Compensation Act. The Act created a coun-

terbalancing statutory framework wherein employees were assured of certain benefits in the event of injury but relinquished the right to maintain a tort action against their employer, and the employer was given the burden of securing compensation for injured employees but was given the benefit of the exclusive remedy provision.

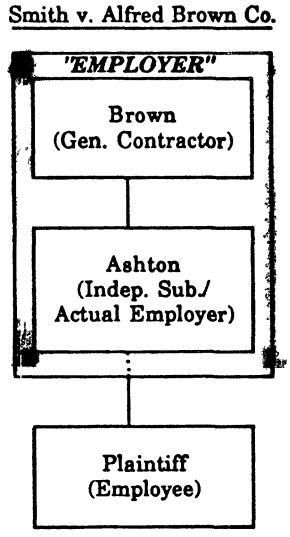
An employee's on-the-job injuries might, however, be caused by the negligence of some third party outside the statutory framework created by the Act. Such a third party did not have the same burden under the Act as an "employer" and should not, therefore, benefit from the exclusive remedy provision. There was no reason not to leave such a third party subject to common-law tort liability.

Accordingly, the Legislature adopted a provision which preserved an injured employee's right to sue such third party or, if the employee elected to take compensation under the Act, allowed the employer or insurance company paying benefits to sue such third party to recover the amount paid as benefits. 1917, Utah Laws, Ch. 100, §72. That provision, which is the predecessor to §62, enabled an injured employee to elect whether to take compensation under the Act or to maintain a tort action against "another not in the same employ", whose negligence caused the employee's injury. Although the provision was subsequently amended to allow an injured employee both to receive compensation under the Act and to pursue a tort action against

the third party, the relevant language remained essentially unchanged until 1975.

Decisions from this Court have consistently held that the ability of an injured employee to pursue a tort action against a third person pursuant to §62 does not abrogate the right of the "employer", as defined in §42, to the benefit of the exclusive remedy provision of §60.

In Smith v. Alfred Brown Co., 493 P.2d 994 (Utah 1972), Brown was the general contractor on a construction project. It subcontracted the masonry work to Ashton, who subsequently employed the plaintiff as a brick mason. The plaintiff was injured in an on-the-job accident and sued Brown for damages. The relationship among the parties in the Smith case is illustrated in the diagram below.

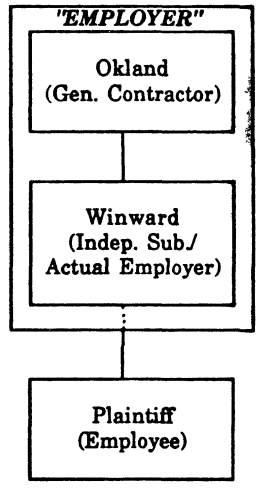


Although the plaintiff argued that Brown was a third person "not in the same employment", the Court analyzed the case

in terms of whether Brown were plaintiff's "statutory employer". The Court found that Brown was plaintiff's "statutory employer" and concluded that, pursuant to §60, "the plaintiff would be covered by workmen's compensation as an employee of the [statutory employer] and thus precluded from maintaining this suit." Id. at p. 996. Essentially, the Court considered §62 not to be applicable since Brown was the "employer" and was therefore entitled to the benefit of the exclusive remedy provision.

Similarly, in Adamson v. Okland Construction Co., 508 P.2d 805 (Utah 1973), Okland was the general contractor for the construction of a hospital. Okland entered in to a subcontract with Winward which employed plaintiff's decedent, Adamson, who was killed in an on-the-job accident. The relationship among the parties in Adamson is diagrammed below.

Adamson v. Okland Construction Co



The Court found the defendant Okland to be plaintiff's "statutory employer" and had no problem "in holding that, therefore, the workmen's compensation was plaintiff's exclusive remedy as against these employers." Id. at p. 808. Again, the Court essentially considered §62 to be inapplicable and ruled that since Okland was plaintiff's "employer", as defined in §42, it was entitled to the benefit of the exclusive remedy provision of §60.

In 1975, the relevant language of §62 was amended. Following that amendment, the Court again had an opportunity to decide whether a "statutory employer" was entitled to the benefit of the exclusive remedy provision of §60 in spite of the now-amended §62. In Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561 (Utah 1978), Hughes was an independent subcontractor who contracted to construct a building for the general contractor[5]. Hughes contracted with Hayes to construct the masonry walls in the building. The plaintiff, Hinds, was an employee of Hayes

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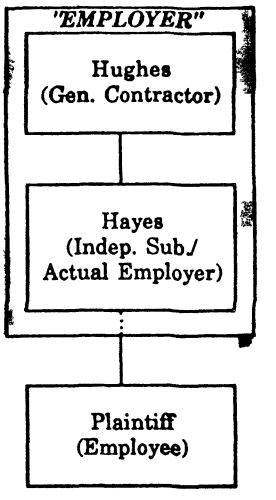
5 Although Hughes was not technically a general contractor, in relation to plaintiff it was essentially in a position equivalent to a general contractor.

and was injured in an on-the-job accident. The relationship among the parties is illustrated below.

Hinds v. Herm Hughes & Sons, Inc.



The Court considered the 1975 amendment to §62 and stated that this amendment

> enables an employee to sue a tortfeasor, not his employer [i.e. "employer" as defined in §42 which includes "statutory employer"]... even though the injured person and the tortfeasor may be engaged in the same employment.

Id. at p. 562 (Emphasis added). The Court then focused on what it considered to be the main question; namely, whether Hughes was the "statutory employer" of Hinds at the time of the accident. The Court discussed the type of control a statutory employer must exercise and indicated that the evidence was in conflict as to the control exercised by Hughes. The Court then stated that "Mr. Hinds' right to recover in this case depends upon his showing that Hughes did not have any right to control the work of Hayes' employees". Id. at p. 563. In other words,

Hinds' right to recover depended on his showing that Hughes was not his statutory employer.

The dissent in Hinds chided the majority for not addressing what the dissent considered to be the critical issue. The dissent argued that the 1975 amendment to §62 was "a manifestation of legislative intent to eliminate from immunity those persons who fell under the umbrella of statutory employer prior to the amendment." Id. at p. 566.[6] Although providing some interesting insights into the background of the Act and the "statutory employer" provision, the dissent in Hinds--as the plaintiff in this case--failed to discern the correct interpretation of the 1975 amendment to §62.

Prior to the 1975 amendment, §62 stated in part as follows:

> When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in case of death his

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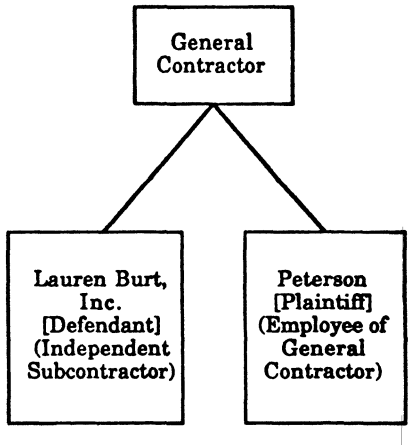
6 If in fact the Legislature did intend in the 1975 amendment to abrogate a "statutory employer's" immunity, the 1975 amendment was anything but a clear manifestation of intent to that effect. Had that truly been the Legislature's intent, that change could have clearly and unambiguously been effected by simply adding the single word "actual" to the exclusive remedy provision of §60 (i.e., workmen's compensation benefits shall be an injured employee's "exclusive remedy against the actual employer"). The substantive right of a "statutory employer" to civil immunity should not be deemed to have been abrogated by legislative action unless the Legislature's intent is expressed more clearly than it was expressed in the 1975 amendment to §62.

> dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person.

(Emphasis added). The "same employment" language of §62 was given an expansive interpretation by this Court, resulting in civil immunity being given to some who were not intended to have it.

In Peterson v. Fowler, 493 P.2d 997 (Utah 1972), plaintiffs were the dependents of Peterson, who had been killed in the course of his employment on a construction site. Plaintiffs claimed that his death was caused by the negligence of Lauren Burt, an independent subcontractor who had been hired by the same general contractor who had hired the deceased. The relationship among the parties in the Peterson case is illustrated below.

Peterson v. Fowler



As can be seen from the illustration above, the defendant in Peterson--unlike the defendants in Smith, Adamson, and Hinds--was neither the plaintiff's actual common-law employer

nor the plaintiff's "statutory employer". The Court analyzed whether plaintiff could maintain his suit against Lauren Burt, not in terms of whether Lauren Burt were plaintiff's "employer" or "statutory employer" and, therefore, entitled to the benefits of the exclusive remedy provision, but rather in terms of whether Lauren Burt were in the "same employment" as plaintiff and, therefore, not subject to suit pursuant to §62. The court stated as follows:

> The term "same employment" has not been defined by our courts in connection with actions by employees against third parties, that is, against one other than their employer. However, the idea of "same employment" was well known in connection with the fellow-servant rule of law prior to the enactment of the Workmen's Compensation Act. The term "same employment" as set out in our Workmen's Compensation Act should be given the meaning which had been attached to it under the cases decided up to that time.

Peterson v. Fowler, supra, at p. 999 (Emphasis added).

The Court then discussed the standard applicable to the fellow-servant rule and stated as follows:

> To be fellow servants, they must be engaged in the same line of work and labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety. They should be at the time of the injury directly operating with each other in the particular business at hand, or they must be operating so that mutual duties bring them into such co-association that they may exercise an influence upon each other to use proper caution and be so situated in their labor to some extent as to be able to supervise and watch the conduct of each other as to skill, diligence, and carefulness. When

> workmen are so engaged, we think they are working in the same employment.

Id. at p. 1000 (Emphasis added).

The Court stated that §62 allows an injured employee to sue a third party for wrongful acts resulting in death or injury "provided the third party is not in the same employment". Id. at p. 1000. The Court concluded that the plaintiff and Lauren Burt were engaged in the "same employment" and that, therefore, plaintiff was not able to maintain his action against Lauren Burt.

The original purpose of §62 was to preserve an injured employee's right to maintain a tort action against third persons who did not enjoy immunity by virtue of being an "employer". The effect of the Peterson decision and of its interpretation of the "same employment" language, however, was potentially to insulate from liability virtually anyone working in relatively close proximity to the injured employee on the same job site. Almost anyone on the job site at the time of the injury could, under the Peterson language, be considered to be in the "same employment" and therefore not subject to suit.

Prompted by the holding of cases such as Peterson v. Fowler, the Utah Legislature in 1975 amended §62 to remove the "same employment" language and to prevent results similar to that reached in Peterson v. Fowler. Whereas, prior to the 1975 amendment, §62 provided that an employee could sue "another person not in the same employment", that section after the

amendment provides that an employee may sue "a person other than an employer, officer, agent, or employee of said employer". The amendment also added a provision indicating that an employee may sue "subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death." (Emphasis added)[7].

The purpose of the amendment was to enable an injured employee to sue a negligent third person--such as the independent subcontractor in Peterson v. Fowler--who, under prior law, would have been immune because it was "in the same employment" as the injured employee. The idea was to make sure that subcontractors and other workers--other than the "employer" as defined in §42--would not continue to have civil immunity extended to

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7 The amendment indicates that the employee may sue subcontractors, general contractors, etc., not occupying an employee-employer relationship, "notwithstanding the provisions of [§42]." The "notwithstanding" language simply makes no sense. Section 42 defines all employers, not just "statutory employers" who are subject to the Act. Essentially, then, this provision of the amendment states that notwithstanding how an employer is defined for purposes of the Act, an employee may sue subcontractors, general contractors, etc. who are not employers. The "notwithstanding" language seems to indicate that the definition of employer should be ignored for this provision, but then the provision later brings that definition back in by stating only those who are not employers may be sued. While the "notwithstanding" language is ambiguous and difficult, if not impossible, to reconcile with the rest of the amendment, the language of the amendment taken as a whole and the placement of the amendment in §62 relating to actions against third persons "other than the employer" support the conclusion that the amendment was intended to effect the result discussed in Busch's brief.

them as Peterson v. Fowler suggested it should be. The intent was not to abrogate civil immunity on behalf of "statutory employers". The effect of the 1975 amendment to §62 was to confine the immunity granted by the Act only to those who were intended to have it; namely, "employers" as defined in §42. The amendment had the effect of overruling Peterson v. Fowler and bringing Utah within the majority of jurisdictions which hold that a subcontractor, such as the one held immune in Peterson v. Fowler, is a "third person" amenable to suit[8].

The scant legislative history accompanying the 1975 amendment supports the foregoing conclusion. The amendment to §62 was contained in Senate Bill No. 26. In his introduction of the bill to the House, Representative Jim Hansen discussed the provision relating to third-party actions and stated as follows:

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8 There is a reason for giving civil immunity to "statutory employers" while not giving it to subcontractors such as the one in Peterson v. Fowler. The reason for that distinction was stated by Professor Larsen, one of the foremost authorities on Workmen's Compensation, as follows:

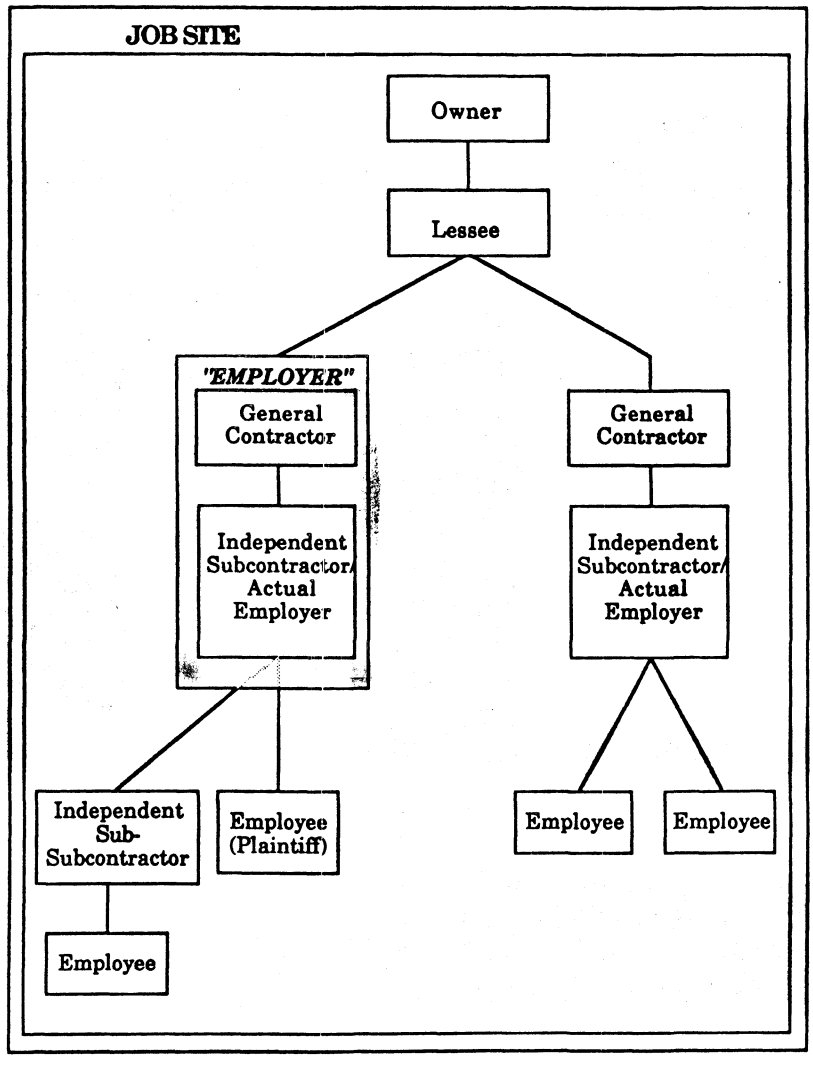
> When ... an employee of the general contractor ... sues the subcontractor in negligence, the great majority of jurisdictions have held that the subcontractor is a third party amenable to suit. The reason for the difference in result [i.e., that a subcontractor is amenable to suit while a general contractor/statutory employer is not] is forthright: The general contractor has a statutory liability to the subcontractor's employee, actual or potential, while the subcontractor has no comparable statutory liability to the general contractor's employee.

2 Larsen, Workmen's Compensation Law, §72.32 at pp. 1450-1451 (1986).

> In effect what this says is an employer who buys a workmen's comp. policy is excluded from a tort action when he has an employee working for him. But let's say, hypothetically, that the employee working for the employer who put the workmen's comp. on is injured by an outsider or third/another party. Say someone coming on the job, a subcontractor, somebody like that, he would then have a right of action against the negligent party who created the tort or created the negligence to the person who was injured.

Introduction of S.B. 26, Disk 318, Line 20, March 5, 1975. (Emphasis added).

The result achieved by the amendment is illustrated in the diagram below.



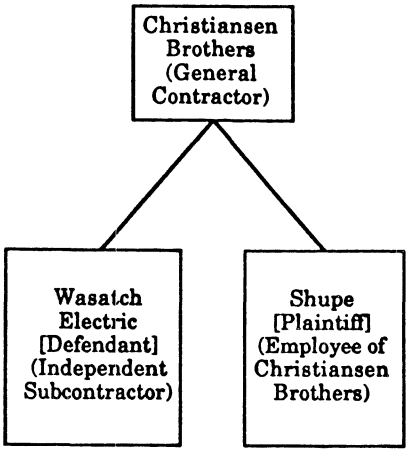
The diagram represents a relatively common situation in the construction industry where more than one general contractor, and the subcontractors and employees of each, are situated on the same job site engaged in different aspects of the project. The employee highlighted in yellow represents the injured employee who is seeking compensation.

The injured employee's "employers", as defined in §42, are highlighted in blue. Prior to the 1975 amendment, although only "employers" of the injured employee were entitled to the benefit of §60's exclusive remedy provision, under the Peterson interpretation of the "same employment" language of §62, all others on the job site were potentially in the "same employment" and, therefore, not subject to tort liability. The 1975 amendment eliminated the "same employment" language and provided instead that an injured employee may sue any "person other than an employer". Because of the 1975 amendment, all of the entities and individuals outside the blue highlighted area became subject to tort liability since they were no longer potentially in the "same employment" as the injured employee but became "other than an employer" of the injured employee.

The effect of the 1975 amendment to §62 was recognized by this Court in the case of Shupe v. Wasatch Electric Co., Inc., 546 P.2d 826 (Utah 1976). In that case, Shupe, a carpenter, was employed by Christiansen Brothers, a general contractor, who had also hired the defendant, Wasatch Electric Company,

an independent subcontractor. The relationship among the parties is indicated in the diagram below.

Shupe v. Wasatch Electric Company Inc.



Plaintiffs were the wife and daughter of Shupe who was killed in an on-the-job accident, allegedly as a result of Wasatch Electric Company's negligence.

The Supreme Court affirmed the lower court's granting of summary judgment to Wasatch, holding that the 1975 amendment did not apply to this action since the occurrences in question took place before the amendment's effective date. In discussing the 1975 amendment to §62, the Court stated that the Legislature, "undoubtedly being aware of the decisions of this Court construing the terms 'same employment'", amended §62 and deleted the "same employment" language[9]. The Court stated that "[t]he

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9 The court in Shupe erroneously states that the "same employment" language had previously been interpreted in Smith v. Alfred Brown Co., supra and Adamson v. Okland Const. Co., supra. Id. at pp. 897 and 898. However, Peterson v. Fowler, supra is the only case where the court construed the "same employment" language. Smith and Adamson dealt with the question of what constitutes a statutory employer. See also Justice Maughan's dissent in Shupe at pp. 899 and 900.

amendment, if applicable, would leave the plaintiff's in court." Id. at p. 898.

Had the amendment applied, therefore, the defendant in Shupe would have been amenable to suit. It is critical to note, however, that the issue in Shupe was not whether a "statutory employer" was entitled to civil immunity under §60. The issue was whether an independent subcontractor hired by the same general contractor as plaintiff's decedent was to be construed under former §62 as being "in the same employment" as plaintiff's decedent and, therefore, immune from suit, or whether he was to be construed under amended §62 as "a person other than an employer" and, therefore, subject to suit. Resolution of the issue in Shupe had no bearing on the issue of whether a statutory employer is entitled to the benefit of the exclusive remedy provision of §60.

As indicated above, the dissenting opinion in Hinds strongly argued that the 1975 amendment to §62 indicates a legislative intent to abrogate immunity on behalf of the "statutory employer". The majority, however, rejected that argument.

Hinds was decided nearly ten years ago in 1978. The Legislature is aware of the majority position in the Hinds decision. Moreover, other cases have relied on Hinds in concluding that a "statutory employer" is entitled to immunity. See, e.g., Jensen v. Price River Coal Co., C-82-1135W (D. Utah 1984). ("The argument [that the 1975 amendment abrogated civil immunity

for statutory employers] is foreclosed by the result reached by the majority in Hinds and by other post-1975 Utah decisions that have consistently recognized that the 1975 amendment did not abrogate statutory employer's immunity").

Despite the elapse of 13 years since adoption of the 1975 amendment and ten years since this Court in Hinds construed the amendment not to abrogate civil immunity for "statutory employers", the Legislature has taken no action to restrict the class of "employers" entitled to the benefits of the exclusive remedy provision. If any such change is to be made it should be made by the Legislature.

Section 62--even as amended in 1975--does not deprive a "statutory employer" of the benefit of §60's exclusive remedy provision. Busch, as plaintiff's "statutory employer", is therefore entitled to the benefit of that provision, and plaintiff may not maintain a tort action against Busch.

POINT III.

EVEN THOUGH IT DID NOT ACTUALLY PAY WORKMEN'S COMPENSATION BENEFITS TO PLAINTIFF, BUSCH IS ENTITLED TO THE BENEFIT OF §60'S EXCLUSIVE REMEDY PROVISION

By incorporating Point II of the Amici brief in the Marathon Steel Co. v. Placers, Inc. case, plaintiff in this case argues that if immunity is granted to "statutory employers", it should only be "when the actual employer has failed or is unable to provide worker's compensation benefits and the statutory

employer has been required to, and in fact has assumed the responsibility for providing benefits to the injured worker". (Amici brief, p. 16). If this argument is accepted, the purpose for which the "statutory employer" provision was adopted would be defeated. Moreover, this argument fails to distinguish between the requirement to "secure compensation" and the actual payment of benefits and erroneously assumes that where the actual employer has secured compensation, the "statutory employer" has incurred no burden.

If plaintiff's argument is accepted, the purpose for which the "statutory employer" provision was adopted would be defeated. The purpose of the "statutory employer" provision is to give an incentive to the general contractor to hire responsible subcontractors and to insist that those subcontractors carry workmen's compensation insurance coverage.

If a general contractor is granted immunity only when the subcontractor fails to secure compensation, a general contractor has absolutely no incentive to hire responsible subcontractors and to insist that they carry insurance. Indeed, a general contractor would have an incentive to do the very thing the "statutory employer" provision was attempting to avoid. A general contractor would have the incentive to hire a sham subcontractor without any insurance coverage because the only way the general contractor would be afforded immunity would be if the subcontractor did not secure compensation. That is not the

type of incentive the "statutory employer" provision attempts to create.

Professor Larsen stated in this regard as follows:

> For many years, a comfortable majority of jurisdictions held that the general contractor in these circumstances [i.e., where the subcontractor carries insurance and the general is not required to pay benefits] remained a third-party subject to common-law liability. But there has been a marked trend in more recent times toward granting immunity to the general contractor when the subcontractor was insured, and even when compensation has been actually paid under the subcontractor's policy.
>
> The cases denying immunity to the general contractor whose subcontractor is insured proceed on the theory that the general contractor's status should be tested by his actual relation to the subcontractor's employee on the given facts and at the specific moment of the accident, not by his potential liability if, for example, the subcontractor failed to carry insurance. In one sense, this is rather harsh on the general contractor. The object of the "contractor under" [statutory employer] statutes is to give the general contractor an incentive to require subcontractors to carry insurance. But if the general contractor does conscientiously insist on this insurance, his reward, under these cases, is loss of exemption from third-party suit. A sounder result would seem to be the holding that the overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of "third-party." He is under a continuing potential liability; he has thus assumed a burden in exchange for which he might well be entitled to immunity from damage suits, regardless of whether on the facts of a particular case actual liability exists.

2 Larsen, Workmen's Compensation Law, §72.31(b) at 14-49 to 14-50 (1986).

Additionally, plaintiff's argument assumes that a "statutory employer" incurs an obligation only when the actual employer has failed to pay workmen's compensation benefits to an injured employee. In the first place, the employer is not obligated to pay benefits to an injured employee, but is merely obligated to "secure compensation" by purchasing insurance coverage so that if an employee is injured, an insurance policy is in place and an insurance company or the State Insurance Fund will pay the employee the benefits due under the Act.[10]

Secondly, this burden of making sure that insurance coverage is in place is the same for both the actual employer and the "statutory employer." As discussed above, the burden imposed on even the actual employer is merely a financial burden or an additional cost of doing business. That additional cost of doing business results from the insurance premium the actual employer must pay to secure workmen's compensation insurance coverage. A "statutory employer" incurs that same additional cost of doing business as the cost of the workmen's compensation insurance premium is passed on to the general contractor/statutory employer by the subcontractor. Indeed, in that situation, the general contractor incurs more of a burden than the actual employer since the actual employer has merely passed its cost for the insurance premium on to the general contractor.

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10 See footnote 3 above.

Granting the "statutory employer" immunity only when the injured employee is unable to obtain workmen's compensation benefits from the subcontractor's insurance company or the subcontractor not only is contrary to the language of the Act and the statutory framework it created, but will also defeat the very purpose for which the "statutory employer" provision was adopted. Accordingly, this Court should reject plaintiff's argument and should affirm the lower court's ruling that §60's exclusive remedy provision prevents plaintiff from maintaining this action against Busch.

POINT IV.

THE PENALTY PROVISION OF §57 DOES NOT APPLY TO BUSCH AND PLAINTIFF MAY NOT MAINTAIN HIS ACTION

Under Point II of his brief, plaintiff argues that because Busch itself did not directly purchase an insurance policy providing for the payment of workmen's compensation benefits, it is subject to the penalty provision of §57. Plaintif's motion for partial summary judgment, denied by the trial court, was based on this argument.

Plaintiff's novel argument is interesting but strained and illogical. It exalts form over substance and simply does not make sense within the statutory framework of the Workmen's Compensation Act. The lower court's denial of plaintiff's motion for partial summary judgment was, therefore, proper and should be affirmed.

As indicated above, §60 provides that workmen's compensation benefits shall be plaintiff's exclusive remedy against his "employer". Busch is plaintiff's "employer" as that term is defined in §42. Accordingly, Busch is entitled to the benefit of the exclusive remedy provision and is not subject to suit by plaintiff.

Plaintiff argues, essentially, that although immune under §60, a "statutory employer" is nevertheless subject to suit under §57. Plaintiff's argument suggests that the Legislature intended to give immunity in one section and obliterate it in another. The Legislature cannot be presumed to have intended such an inconsistent and absurd result. See, Millett v. Clark Klemick Corp., 609 P.2d 934 (Utah 1980).

Plaintiff's argument also assumes that Busch did not comply with the provisions of §46. However, Busch did comply with the requirements of that section. Section 46 requires an employer to "secure compensation" by providing workmen's compensation insurance coverage for employees. As discussed above, the purpose for placing this burden on a general contractor was to give the general contractor an incentive to hire responsible subcontractors and to insist that the subcontractors provide workmen's compensation insurance coverage for their employees. This requirement puts the ultimate responsibility on the presumably responsible general contractor who "has it within his power, in choosing subcontractors, to pass upon their responsi-

bility and insist upon appropriate compensation protection for their workers." Pinter Construction Co. v. Frisby, 678 P.2d 305, 307 (Utah 1984).

Busch fulfilled the requirement imposed by the Act. Busch insisted in its subcontract with TEAM that TEAM have workmen's compensation insurance coverage for its employees. Plaintiff was one of TEAM's employees. He was injured in an on-the-job accident and for those injuries received workmen's compensation benefits from TEAM's insurer. Plaintiff's receipt of compensation for his injuries was made possible by Busch through Busch's requirement that TEAM maintain workmen's compensation insurance.

Plaintiff's argument loses sight of the purpose for the penalty provision of §57. The purpose of §57 is not to penalize in the abstract. Section 57 was not enacted in a vacuum, but was enacted as part of the Workmen's Compensation Act and intended as a measure to motivate employers to make sure that compensation benefits were available to be paid to injured employees.

Even though plaintiff has already received the workmen's compensation benefits the Act contemplates, he now attempts to contort the provisions of the Act and impose a penalty where it was not intended to be imposed. It would be ludicrous to impose a penalty where the very end the penalty was intended to achieve has been accomplished.

The penalty provision of §57 was designed as a measure to ensure that injured employees receive compensation for injuries. Plaintiff has received compensation, and it would be unfair to impose a penalty on Busch, whose efforts made those benefits possible. Busch has fully complied with the obligation imposed upon it by the Act and is not subject to the penalty provision of §57.

Furthermore, giving plaintiff the benefit of the penalty provision of §57 would be contrary to the purpose and intent of §57 and §58. Section 57 provides that employers who fail to comply with the provisions of §46 shall be liable in a civil action to injured employees. Section 58 provides that the employee may, in lieu of proceeding against the employer under §57, receive the compensation as provided in the Act. An injured employee, therefore, is required to choose between maintaining a civil action against the employer under §57 or, in lieu thereof, filing an application with the Commission pursuant to §58 for compensation as provided in the Act.

If plaintiff's argument is accepted, plaintiff would have the benefit of both sections. He not only would receive the workmen's compensation benefits provided for in the Act, but also would be entitled to proceed against Busch under §57. Such a result would be unfair to Busch and inconsistent with the purpose and intent of the Act's penalty provisions.

In support of his argument that Busch should be penalized under §57, plaintiff argues that the purpose of the "statutory employer" provision is to provide duplicative worker's compensation insurance coverage. Adopting plaintiff's argument would result in economic waste and a windfall to insurance companies.

Suppose a general contractor engages an independent subcontractor who in turn engages another independent subcontractor who hires an individual as an employee. Under plaintiff's view, the general contractor, the subcontractor under it, and the subcontractor under it would each be required to obtain a separate insurance policy providing for the payment of workmen's compensation benefits. If an employee of the lowest level subcontractor is injured and receives workmen's compensation benefits through the policy purchased by that subcontractor (his actual employer), the policies provided by the general contractor and its subcontractor become meaningless, and the premiums paid for those policies would be entirely wasted. The only beneficiary in this kind of scenario is the insurance companies who received premiums for duplicative insurance. The Legislature should not be presumed to have intended such a ridiculous result where economic waste occurs and where no greater protection is afforded to workers.

What is contemplated by the "statutory employer" provision is not duplicative insurance coverage, but duplicative

responsibility. The purpose for the provision was "to give the general contractor an incentive to require subcontractors to carry insurance", 2 Larsen Workmen's Compensation Law, §72.31(b) at 14-49 (1986), and to impose ultimate liability on the general contractor if it did not. It is in the general contractor's interest, therefore, to hire only responsible subcontractors and to insist that they acquire workmen's compensation insurance coverage for their employees. If a subcontractor does not obtain workmen's compensation insurance coverage and is insolvent, the injured worker can look to the general contractor for benefits.

Plaintiff also argues that failure to penalize Busch will encourage similarly situated general contractors to "run roughshod over the job site" (Appellant's brief, p. 15) and to ignore safety considerations. Apart from ignoring the practical reality that a general contractor who does not give consideration to safety simply cuts his own throat because of the delay, work interruption, and cost which injuries create, plaintiff's argument ignores other provisions of the Act which apply to a "statutory employer" and which provide substantial incentive to maintain a safe workplace.

One such provision is found in §19 which authorizes the Industrial Commission to investigate complaints of unsafe workplaces and, if necessary, to petition the District Court of Utah for a temporary injunction restraining the further opera-

tion of business. Additionally, §39 imposes the penalty of misdemeanor upon any "employer" (including, under §42, "statutory employer") who fails to obey an order made by the Commission. The threats of having the business shut down and of being guilty of a misdeameanor provide the real incentive to maintain a safe workplace.

Plaintiff argues that if only the actual employer is required to obtain workmen's compensation insurance coverage and an employee is injured due to the negligence of a "statutory employer", the 15 percent surcharge on compensation paid would be unfair to the actual employer's insurance carrier. Assuming that in such a situation the actual employer's insurance carrier would be required to pay the 15 percent surcharge, it is inconceivable how requiring the general contractor to obtain separate and duplicative insurance coverage would make any difference.

Plaintiff also argues that the 15 percent surcharge paid by the actual employer's carrier would be unfair to the actual employer since its workmen's compensation premiums are based upon the risk assumed. However, that risk would presumably include the entire job site, including whatever effects the general contractor's presence and involvement would have. In any event, there is no unfairness to the subcontractor/actual employer. The premium for workmen's compensation insurance, in whatever amount, is passed on to the general contractor in the contract with the general contractor.

Plaintiff argues further that the more control a general contractor has over a subcontractor, the more likely the general contractor will be deemed an immune "statutory employer" and that, consequently, statutory employers who direct every action of the subcontractor's employees are encouraged to do so negligently. Plaintiff's argument makes no sense. In the first place, to have sufficient "supervision or control" to qualify as a "statutory employer", the general contractor need only "retain ultimate control over the [construction] project". Bennett v. Industrial Commission of Utah, 726 P.2d 427, 432 (Utah 1986). Moreover, the more control a general contractor exercises over the subcontractor and its employees, the closer the general contractor comes to being considered the actual employer. Whether actual employer or "statutory employer", however, the general contractor would be an "employer" subject to the requirement to "secure compensation" and also subject to the Commission's authority and power to have the further operation of an unsafe business restrained.

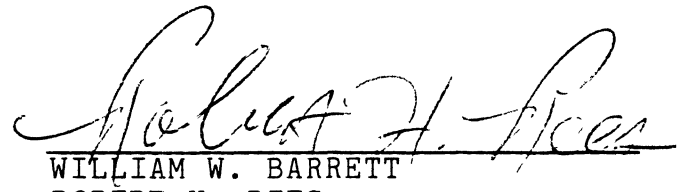
In summary, the Act does not contemplate duplicative insurance, but duplicative responsibility. The Act and its penalty provisions were intended to ensure the payment of benefits to injured employees. That purpose has been achieved in this case as plaintiff has received benefits. The penalty provision of §57 does not apply in this case, and plaintiff may not maintain his action based on that provision.

CONCLUSION

For the foregoing reasons, defendant/respondent Busch Development Inc., respectfully requests the Court to affirm the lower court's granting Busch's motion for summary judgment and denying plaintiff's motion for partial summary judgment.

DATED this 8th day of February, 1988.

KIPP AND CHRISTIAN, P.C.



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CERTIFICATE OF DELIVERY

MAILED, postage prepaid, this 8th day of February, 1988, four true and correct copies of the foregoing Reply Brief of Respondent, to the following:

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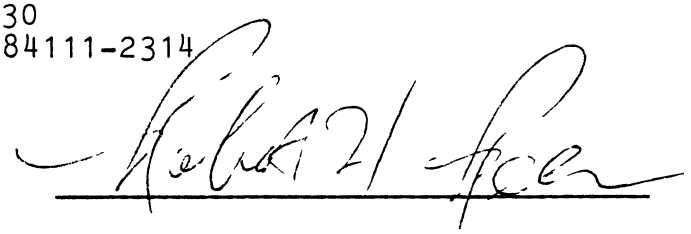

APPENDIX

Sec. 50. **Employers subject to this Act.** The following shall constitute employers subject to the provisions of this Act:

(1) The State and each county, city, town and school district therein.

(2) Every person, firm and private corporation, including every public utility, that has in service four or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic servants; provided, that employers who have in service less than four employes shall have the right to come under the terms of this Act by complying with the provisions thereof, and all the rules and regulations of the commission. The term "regularly" as herein used shall include all employments, whether continuous throughout the year or for only a portion of the year. It means all employments in the usual course of the trade, business, profession or occupation of an employer.

Sec. 52a. **Payments o. compensation.** If a workman receives per[illegible] sonal injury by accident arising out of and in the course of his employment, his employer, or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified.

Sec. 53. Securement of compensation—insurance associations subject to rules. Employers, but not including municipal bodies, shall secure compensation to their employes in one of the following ways:

(1) By insuring and keeping insured the payment of such compensation with the State insurance fund, or

(2) By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the State, or

(3) By furnishing to the commission satisfactory proof of financial ability to pay direct the compensation in the amount and manner and when due as provided for in this Act. In the latter case the commission may in its discretion require the deposit of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred.

All stock corporations or mutual associations transacting the business of workmen's compensation insurance in this State under the terms of subdivision (2) of this section shall be subject to the rules and regulations of the commission with respect to rates to be charged and methods of compensation to be used.

Section 71. **Right to recovery under this Act exclusive remedy—exceptions.** The right to recover compensation pursuant to the provisions of this Act for injuries sustained by an employe shall be the exclusive remedy against the employer, except that where the injury is caused by the employer's wilful misconduct and such act causing such injury is the personal act of the employer himself, or if the employer be a partnership, on the part of one of the partners, or if a corporation, on the part of an elective officer or officers thereof, and such act indicates a wilful disregard of the life, limb or bodily safety of employes, such injured employe may, at his option, either claim compensation under this Act or maintain an action at law for damages. The term "wilful misconduct," as employed in this section shall be construed to mean an act done knowingly and purposely with the direct object of injuring another.

Sec. 72. **Election as to remedy—assignment of cause—compromise.** If an employe entitled to compensation under this Act be injured or killed by the negligence or wrong of another not in the same employ, such injured employe, or in case of death, his dependents, shall, before any suit or claim under this Act, elect whether to take compensation under this Act or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this Act, the cause of action against such other shall be assigned to the State for the benefit of the State insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the State insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this Act for such case. Such a cause of action assigned to the State may be prosecuted or compromised by the commission. A compromise of any such cause of action by the employe or his dependents at an amount less than the compensation provided for by this Act, shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the State insurance fund, and otherwise with the written approval of the person, association or corporation liable to pay the same.

3110. Employers subject to provisions—terms used. The following shall constitute employers subject to the provisions of this title:

(1) The State, and each county, city, town and school district therein.

(2) Every person, firm and private corporation, including every public utility, that has in service three or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic servants; provided, that employers who have in service less than three employees and employers of agricultural laborers and domestic servants shall have the right to come under the terms of this title by complying with the provisions thereof and all rules and regulations of the Commission.

The term "regularly," as herein used, shall include all employments, whether continuous throughout the year or for only a portion of the year. It means all employments in the usual course of the trade, business, profession or occupation of an employer.

Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and the work so procured to be done is a part or process in the trade or business of said employer, then such contractor and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this Section, employees of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor, shall be deemed an employer within the meaning of this Section. The words "independent contractor," as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, and while so engaged, is independent of the employer in all that pertains to the execution of the work is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design.

35-1-19. **Investigation of places of employment—Violations of rules or orders—Temporary injunction.**—Upon complaint by any person that any employment or place of employment, regardless of the number of persons employed, is not safe or is injurious to the welfare of any employee, the commission shall proceed, with or without notice, to make such investigation as may be necessary to determine the matter complained of. After such investigation the commission shall enter such order relative thereto as may be necessary to render such employment or place of employment safe and not injurious to the welfare of the employees therein. Whenever the commission shall believe that any employment or place of employment is not safe or is injurious to the welfare of any employee it may, of its own motion, summarily investigate the same, with or without notice, and issue such order as it may deem necessary to render such employment or place of employment safe.

Notwithstanding any other penalty provided in this title, if any employer, after receiving notice, fails or refuses to obey the rules, regulations, or order of the commission relative to the protection of the life, health, safety and/or welfare of any employee the district court of Utah, is empowered, upon petition of the commission to issue, ex parte and without bond, a temporary injunction restraining the further operation of the employer's business.

35-1-39. **Violation of judgments, orders, decrees or provisions of act—Grade of offense.**—If any employer, employee or other person violates any provision of this title, or does any act prohibited hereby, or fails or refuses to perform any duty lawfully imposed, or fails, neglects or refuses to obey any lawful order given or made by the commission, or any judgment or decree made by any court in connection with the provisions of this title, such employer, employee or other person shall be guilty of a misdemeanor.

35-1-42. Employers enumerated and defined—Regularly employed—Independent contractors.—The following shall constitute employers subject to the provisions of this title:

(1) The state, and each county, city, town and school district therein.

(2) Every person, firm and private corporation, including every public utility, having in service one or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic servants; provided, that employers of agricultural laborers and domestic servants, shall have the right to come under the terms of this title by complying with the provisions thereof and the rules and regulations of the commission.

The term "regularly" as herein used shall include all employments in the usual course of the trade, business, profession or occupation of the employer, whether continuous throughout the year or for only a portion of the year.

Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this section, employees of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this section. The term "independent contractor," as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, who, of the commission. All such penalties when collected shall be paid into the combined injury benefit fund.

35 1 46. Employers to secure compensation Ways allowed-Failure-Notice-Injunction Violation Penalty.-Employers including counties, cities, towns and school districts shall secure compensation to their employees in one of the following ways:

(1) By insuring, and keeping insured, the payment of such compensation with the state insurance fund which payment shall commence within 90 days of any final award of the commission.

(2) By insuring, and keeping insured, the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state which payment shall commence within 90 days of any final award of the commission.

(3) By furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount, in the manner and when due as provided for in this title which payment shall commence within 90 days of any final award of the commission. In such cases the commission may in its discretion require the deposit of acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred, and may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of law relating to the payment of compensation and the furnishing of medical, nurse and hospital services, medicines and burial expenses to injured, and to the hospital services, medicines and burial expenses to injured, and to the dependents of killed employees. The commission may in proper cases revoke any employer's privilege as a self-insurer.

The commission is hereby authorized and empowered to maintain a suit in any court of the state to enjoin any employer, within the provisions of this act, from further operation of the employer's business, where the employer has failed to insure or to keep insured in one of the three ways in this section provided, the payment of compensation to injured employees, and upon a showing of such failure to insure the court shall enjoin the further operation of such business until such time as such insurance has been obtained by the employer. The court may enjoin the employer without requiring bond from the commission.

If the commission has reason to believe that an employer of one or more employees is conducting a business without securing the payment of compensation in one of the three ways provided in this section, the commission

may give such employer five days' written notice by registered mail of such noncompliance and if the employer within said period does not remedy such default, the commission may file suit as in this section above provided and the court is empowered, ex parte to issue without bond a temporary injunction restraining the further operation of the employer's business.

The commission is hereby authorized and empowered to maintain a suit in any court of the state to enjoin any employer, within the provisions of this act, from further operation of the employer's business, where the employer has failed to insure or to keep insured in one of the three ways in this section provided, the payment of compensation to injured employees, and upon a showing of such failure to insure the court shall enjoin the further operation of such business until such time as such insurance has been obtained by the employer. The court may enjoin the employer without requiring bond from the commission.

If the commission has reason to believe that an employer of one or more employees is conducting a business without securing the payment of compensation in one of the three ways provided in this section, the commission may give such employer five days' written notice by registered mail of such noncompliance and if the employer within said period does not remedy such default, the commission may file suit as in this section above provided and the court is empowered, ex parte to issue without bond a temporary injunction restraining the further operation of the employer's business.

Any employer who shall fail to comply with the provisions of section 35-1-46 shall be guilty of a misdemeanor and upon complaint of the commission and conviction thereof shall be punished by a fine of not less than $10 nor more than $100 or by imprisonment in the county jail for not less than thirty days nor more than six months or by other such fine and imprisonment Each days' failure shall be a separate offense. All funds so collected shall be deposited in the special fund as described in section 35-1-68 and used for the purposes in this title provided.

35-1-57. Noncompliance—Penalty.—Employers who shall fail to comply with the provisions of section 35-1-46 shall not be entitled to the benefits of this title during the period of noncompliance, but shall be liable in a civil action to their employees for damages suffered by reason of personal injuries arising out of or in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees, and also to the dependents or personal representatives of such employees where death results from such injuries. In any such action the defendant shall not avail himself of any of the following defenses: the defense of the fellow-servant rule, the defense of assumption of risk, or the defense of contributory negligence. Proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury. And such employers shall also be subject to the provisions of the two sections next succeeding [35-1-58, 35-1-59]. In any civil action permitted under this section against the employer the employee shall be entitled to necessary costs and a reasonable attorney fee assessed against the employer.

35-1-58. Rights of employees where employer fails to comply.—Any employee, whose employer has failed to comply with the provisions of section 35-1-46, who has been injured by accident arising out of or in the course of his employment, wheresoever such injury occurred, if the same was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceeding against his employer by civil action in the courts as provided in the last preceding section [35-1-57], file his application with the commission for compensation in accordance with the terms of this title, and the commission shall hear and determine such application for compensation as in other cases; and the amount of compensation which the commission may ascertain and determine to be due to such injured employee, or his dependents in case death has ensued, shall be paid by such employer to the persons entitled thereto within ten days after receiving notice of the amount thereof as so fixed and determined by the commission.

35-1-60. Exclusive remedy against employer, or officer, agent or employee—Occupational disease excepted.—The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

(PRE-1975)

35-1-62. Injuries or death caused by wrongful acts of third parties—Remedies of employee—Rights of employer or insurance carrier in cause of action—Maintenance of action—Disbursement of proceeds of recovery.—When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. No attorneys' fee chargeable to the carrier or employer under this section shall exceed 15% of the compensation either one may be obligated to pay. Such fee is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party. Before proceeding against the third party, the injured employee, or, in case of death, his heirs, shall give written notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

(POST-1975)

35-1-62. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of said employer — Rights of employer or insurance carrier in cause of action — Maintenance of action — Notice of intention to proceed against third party — Right to maintain action not involving employee-employer relationship — Disbursement of proceeds of recovery.

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission. Before proceeding against the third party, the injured employee, or, in case of death, his heirs, shall give written notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

For the purposes of this section and notwithstanding the provisions of section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation